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No.

In The

Supreme Court of the United States

October Term, 1997

ANN L. GILL,

Petitioner,

vs.

SYSTEM PLANNING CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Must a plaintiff claiming unlawful retaliation under Title VII of the Civil Rights Act of 1964 prove "pretext-plus," that is, some factor in addition to a prima facie case and the jury's disbelief of the defendant's offered justification, in order to prevail?

2. Must an employee forced to resign employment demonstrate that the employee literally had "no choice" but to quit, in order to recover on a theory of constructive discharge under Title VII of the Civil Rights Act?

LIST OF PARTIES TO THE PROCEEDING

This matter involves two parties: Petitioner Ann L. Gill, plaintiff below, and her former employer, Respondent System Planning Corporation, defendant below.

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CITATION OF THE REPORTS OF OPINIONS IN THE CASE

None of the opinions in this case have been reported officially. The Memorandum Opinion of the District Court is included in the Appendix. The opinion of the Court of Appeals reversing the District Court, and the order denying Rehearing or Rehearing En Banc, are also included in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Court of Appeals in this matter was issued on August 25, 1997. A timely petition for rehearing and suggestion for rehearing en banc was filed on September 5, 1997 and was denied on September 18, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the judgment in question by writ of certiorari. The order of the district court from which an appeal was taken to the Court of Appeals was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are set forth verbatim in the Appendix. The statutes and provisions involved are the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a); and Section 107 of the Civil Rights Act of 1991, 42 U.S.C § 1981a.

STATEMENT OF THE CASE

A. Factual Predicates for Petitioner's Claims

This is an employment retaliation case under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Ms. Gill was formerly Assistant Deputy of Corporate Security for defendant System Planning Corporation, and had been employed by SPC from 1984 through August 1994. J.A. at 786. (References to the Record are to the Joint Appendix filed in the Court of Appeals.)

In April 1994, two months prior to Ms. Gill's protected complaint of discrimination, Ms. Gill was identified as one of the three "key" members of the Security department, by SPC's outside reorganization consultant Dorsey Clement. The designation of Ms. Gill as one of those three "key" employees meant that SPC would consider Ms. Gill a long term participant in the Security department — an employee who was "critical" to the long term success of Security. J.A. at 626, 845-46.

Shortly thereafter, Ms. Gill applied for, but did not get, a promotion within the Security department; the position went, instead, to SPC's librarian. Ms. Gill complained internally that she was passed over for promotion because of her race: SPC had been experiencing racial turmoil, and Ms. Gill (who is white) believed she was passed over for promotion in favor of the librarian (who is Black) on the basis of her race.

Ms. Gill believed, in good faith, that her promotion was racially tainted; the jury disagreed, but that matter is not pertinent to the remaining claim in this case: Immediately following Ms. Gill's complaint of discrimination, (J.A. at 166-67, 172, 421), SPC began to engage in a pattern of antagonistic and retaliatory conduct. Within six weeks of Ms. Gill's protected activity, she was forced to resign.

No reasonable person would have remained working for SPC under the retaliatory conditions imposed on Ms. Gill. SPC's Director of Administration, Linda Easley — who made the promotion decision which Ms. Gill challenged — recommended Ms. Gill for psychological counseling. J.A. at 176. At a lengthy meeting just one week after Ms. Gill's complaint, a meeting ostensibly to consider that complaint, Ms. Easley grilled Ms. Gill at length on such intrusive and irrelevant subjects as Ms. Gill's romantic relationships, and Ms. Gill's high school IQ scores. J.A. at 174. Otherwise, Ms. Easley barely spoke to Ms. Gill. J.A. at 177.

About two weeks later — that is, within three weeks of Ms. Gill's complaint — Ms. Easley told Ms. Gill that her job had been eliminated. SPC terms this a "downsizing" and "reorganization" (the jury did not agree); despite Ms. Gill's status as one of the three "key" employees in the Security department, she was the only departmental employee "downsized" or "reorganized" involuntarily from the department. J.A. at 626, 666, 845-46. Moreover, within weeks of Ms. Gill's forced resignation, two other employees were hired or transferred into the Security department. J.A. at 432, 434, 831, 835, 859.

Ms. Easley rejected each of Ms. Gill's suggestions for alternate placement in the company (at least one because Ms. Easley herself would be working with that division). J.A. at 178-79.

In response to Ms. Gill's interest in continuing to work with a Local Area Network program, Ms. Easley expressed skepticism since the position was primarily an overhead function. J.A. at 178-79. However, the position to which Ms. Easley involuntarily transferred Ms. Gill was itself a 100% overhead function. J.A. at 199.

Ms. Gill was ultimately demoted to a "facilities" position, where her responsibilities required only twelve hours of work per week, and consisted mainly of packing boxes, stocking conference rooms, and providing telephone "support." J.A. at 194-96. Following this transfer, Ms. Gill was specifically prohibited from assisting her former security colleagues in any way, regardless of the Security department's needs and regardless of Ms. Gill's ability to provide assistance. J.A. at 206.

Ms. Gill gamely reported to her "facilities" position. During her first week, however, she was excluded from a departmental meeting. J.A. at 203-04. And several days later, Ms. Gill was omitted from a listing of the responsibilities of each employee in the department (which was also under Ms. Easley's control). J.A. at 209-11, 470-71, 794-828. These portents convinced Ms. Gill that her days at SPC were numbered, even in the part-time job of box-mover. J.A. at 281. Ms. Gill tendered her resignation; SPC made no attempt to persuade her to stay. J.A. at 214.

B. Proceedings Below

Senior Judge Albert V. Bryan, Jr., presided over the trial of this matter. The jury returned a mixed verdict: for SPC on Ms. Gill's claim of discrimination in the promotion process, and for Ms. Gill on her claims of retaliation and constructive discharge. The jury awarded a modest compensatory damages verdict of $80,000.

SPC moved for judgment as a matter of law or, alternatively, for a new trial. Senior Judge Bryan denied these motions and entered judgment on the jury verdict.

On August 25, 1997, a panel of the United States Court of Appeals for the Fourth Circuit reversed the district court, and

entered judgment for SPC on the retaliation and constructive discharge claims. Ms. Gill filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on September 18, 1997. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In the Fourth Circuit, the right to a jury trial in civil rights cases is seriously in jeopardy.[1] In this case the Court of Appeals, using an improper legal standard, set aside the modest and considered verdict of a properly-instructed jury, which verdict had been reviewed and confirmed by one of the most experienced federal trial judges in the country.

I.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND FROM MANY OTHER COURTS OF APPEALS RESPECTING THE REQUIREMENT THAT A PLAINTIFF SHOW "PRETEXT PLUS" TO SUPPORT A FINDING OF INTENTIONAL RETALIATION.

The district court held that Ms. Gill had properly proven a prima facie case of retaliation, a holding the Court of Appeals did not disturb. SPC's decision-maker, Ms. Easley, testified to the jury about her reasons for transferring Ms. Gill from her Security Deputyship to a job moving boxes. The jury did not believe Ms. Easley told the truth. Under the decision of this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125

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1. *See also* the petitions for certiorari in *Grier v. Titan Corp.* and *Hetzel v. County of Prince William, et al.*, filed concurrently with the instant petition, in which the Fourth Circuit also rejected the properly-instructed juries' assessment of damages and liability in employment related civil rights cases.

L. Ed. 2d 407, 113 S.Ct. 2742 (1993), nothing more is necessary to support — albeit not to compel — a jury verdict in favor of Ms. Gill.

The Fourth Circuit panel held that Ms. Gill's retaliation claim failed because it found "no evidence to refute [Easley's] explanation for the decision to transfer Gill to another department." Slip Op. at 6. But contrary to the opinion of the Court of Appeals, the fact that Ms. Easley "explained during her testimony" that Ms. Gill's transfer occurred because her services, described by Ms. Easley as "primarily clerical and administrative," were no longer needed and could be performed by a computer, does not make that explanation so — and certainly does not compel a jury to believe her. *See* Slip Op. at 6. The record is replete with evidence from which the jury could conclude that Ms. Easley and SPC were not worthy of belief — the "suspicion of mendacity" noted in *Hicks*.

Ms. Easley lied about her involvement in a racial slur incident, J.A. at 454-55, and was seriously impeached by documentary evidence in her testimony regarding the job performance of the woman promoted over Ms. Gill, J.A. at 460-62. Regardless of the intrinsic veracity of Ms. Easley herself, the jury could easily have found her testimony incredible: Ms. Gill, one of the key members of the security department and one who should be recognized and groomed for increased supervisorial and managerial responsibilities, J.A. at 626, 845-46, was the only department member involuntarily dispossessed from her job — just weeks after Ms. Gill's complaint of discrimination, and just weeks before two other persons joined the same department. A decision to act adversely toward an employee which is based upon unlawful considerations does not become lawful, or legitimate, because it can be mischaracterized as a business decision. *See Equal Employment Opportunity Commission v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 833 (6th Cir. 1997).

But these specific factual matters beg the question. ***The jury was entitled to disbelieve SPC and its witnesses.*** As *Hicks* recognized, the fact

> [t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [retaliation] is correct. **That remains a question for the factfinder to answer**. . . .

Hicks, supra, 509 U.S. at 524 (emphasis added).

In short, the Court of Appeals in this case required Ms. Gill to prove a prima facie case, **and** for the jury to disbelieve the defendant, **and** something **in addition** to this disbelief. This "pretext-plus standard" is inconsistent with the decision of this Court in *Hicks*, and is contrary to the decisions of many of the Courts of Appeals interpreting and applying *Hicks*. *See Rothmeier v. Investment Advisers, Inc., et al.*, 85 F.3d 1328, 1334 (8th Cir. 1996).

In *Hicks*, this Court explicitly stated that a jury finding that the "legitimate, nonretaliatory reasons" proffered by an employer are pretextual, permits the factfinder to draw the inference that the defendant intentionally discriminated against the plaintiff:

> The factfinder's disbelief of the reasons set forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such

> rejection, "[n]o additional proof of discrimination is required."

509 U.S. at 511 (citation and footnote omitted).

While four Justices of this Court dissented in *Hicks*, none of the dissenting opinions support the tack taken by the Fourth Circuit. Rather, the dissenting Members of this Court in *Hicks* would have affirmed the Eighth Circuit's rule that once the factfinder rejects the employer's explanations for its decision, a finding of discrimination is required. *See, e.g., Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1529 (11th Cir. 1997); *Sheridan v. E.I. DuPont De Nemours and Comp., et al.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc).

At least eight Circuit Courts of Appeals have interpreted *Hicks* to mean that the discrediting of a defendant's proffered nondiscriminatory reason for its actions, taken together with the plaintiff's prima facie case, is sufficient to support a finding of discrimination. *See, e.g., U.S. Equal Employment Opportunity Commission v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) ("finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination"); *Sheridan, supra*, 100 F.3d 1061 (3d Cir. 1996) (en banc) ("elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination"); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury must draw, to a permissive one the jury may draw, provided that the jury finds the employer's explanation

'unworthy' of belief"); *Perdomo v. Browner*, 67 F.3d 140, 146 (7th Cir. 1995) ("the trier of fact is permitted to infer discrimination from a finding that the employer's proffered reason was spurious"); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1110 (8th Cir. 1994) ("elements of the plaintiff's prima facie case are thus present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The 'ultimate question' of discrimination must therefore be left to the trier of fact to decide."), *cert. denied*, 130 L. Ed. 2d 310, 115 S. Ct. 355 (1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed"); *Combs*, *supra*, 106 F.3d at 1529 (11th Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination").

The decision of the Fourth Circuit in this case cannot be reconciled with *Hicks* or its progeny in the other Circuits.

In sum, the Fourth Circuit's requirement of "pretext-plus" is nothing more or less than second-guessing the jury's decision to disbelieve the defendant. The Court of Appeals for the Eleventh Circuit elaborates on this point, and correctly cautions:

> **In answering that question, the jury must perform its traditional duties of assessing the credibility of witnesses through observation of trial testimony and of weighing the evidence** — tasks peculiarly within the province of the jury. In performing those traditional duties, the jury must

> measure the strength of the permissible inference of discrimination that can be drawn from the plaintiff's prima facie case along with the evidence that discredits the employer's proffered explanations for its decision. . . . **That decision is entrusted to the jury's discretion.** . . .

Combs, 106 F.3d at 1538 (emphasis added).

This Court should grant this petition for a writ of certiorari to resolve this conflict between the Fourth Circuit and all other federal circuits in this important area of civil rights law.

II.

THE COURT OF APPEALS APPLIED AN IMPOSSIBLY RESTRICTIVE STANDARD FOR PROOF OF CONSTRUCTIVE DISCHARGE, IN CONFLICT WITH EARLIER DECISIONS FROM THAT COURT AND FROM OTHER COURTS OF APPEALS.

Beginning with *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *dissenting opinion adopted in part*, 900 F.3d 27 (1990) (en banc), the Court of Appeals for the Fourth Circuit has held that a constructive discharge plaintiff under Title VII must demonstrate that her working conditions were objectively intolerable, that is, that a reasonable person in her position would have felt compelled to resign.

In the past three years, however, a series of panel opinions in the Fourth Circuit have altered that reasonable *en banc* guidance by transforming the burden an impossible one to meet: that a plaintiff must prove that she had literally "no choice but to resign." *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996), relied upon by the appellate and trial courts in this case.

This impossibly-high standard makes the remedy the Civil Rights Act affords to persons forced to leave a job utterly meaningless: no other Court of Appeals has raised the bar so high; no other Court of Appeals has established such an internally inconsistent standard. An employee almost **always** has **some** choice: the choice to stay employed and be raped, for example, is still a "choice." *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995). Indeed, earlier precedent from the Fourth Circuit confirms that an employee in Ms. Gill's situation may be found by a trier of fact to have been constructively discharged: if the employee is "treated rudely" and her complaints of discrimination are met in a "condescending and abusive manner," *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1274 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, 102 S. Ct. 2952, 73 L. Ed. 2d 1345 (1982), a jury may find a constructive discharge. If the employee is confronted with "unreasonably harsh conditions, in excess of those faced by [her] co-workers," *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986), or "singled out for any unique treatment," *Bristow*, 770 F.2d at 1256, the jury may find a constructive discharge. Where an employee is denied equal status with her coworkers and her shift is changed to accommodate others, a constructive discharge may be found. *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985). Where an employee is assigned duties which were not assigned to non-protected individuals at his level, constructive discharge liability may lie. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154, 80 L. Ed. 2d 539 (1984). In Ms. Gill's case, these and more severe elements are present beyond question, and the jury properly found a constructive discharge had occurred.

The "no choice" standard applied by the Court of Appeals in this case is flatly inconsistent with the law as it has developed in other Circuits. The Court of Appeals for the Tenth Circuit recently wrote that "an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired." *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975, 978 (10th Cir. 1996), citing *Acrey v. American Sheep Industry Association*, 981 F.2d 1569, 1573-74 (10th Cir. 1992). *See, e.g., Maschuka v. Genuine Parts Co.*, __ F.3d __, 1997 U.S. App. LEXIS 21132 (8th Cir. Aug. 11, 1997) (employee asked to stay on in lower paying position states claim for constructive discharge); *Equal Employment Opportunity Commission v. Massey Yardey Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (employee who sees employer advertise for replacement, and who is denied raise, states claim for constructive discharge); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) ("if an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge"); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (reversing judgment for defendant as a matter of law) (where employee suffers no decrease in salary, but is transferred to a non-supervisory position, constructive discharge claim has been stated).

In any other Circuit (or, indeed, in the Fourth Circuit just a few years ago) Ms. Gill's jury verdict would have been affirmed without comment. The drift in the Fourth Circuit towards a semantically-contentless and internally-inconsistent "no choice" standard has severely handicapped the enforcement of the Civil Rights Act in the states comprising the Fourth Circuit.

This drift also has created a perverse incentive for employers to make life a living hell for employees such as Ms. Gill who demand adherence to law, all the while knowing that Ms. Gill can always exercise her "choice" to endure horrific conditions, thus immunizing the employer from liability under Title VII.

This Court has never addressed the proper standard to be met by a constructive discharge plaintiff under Title VII. It would be appropriate for this Court to grant this petition for certiorari to resolve this important issue, as to which the various Courts of Appeals have reached sharply differing results.

CONCLUSION

Ms. Gill respectfully requests that this Court grant her petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Dated: December 8, 1997

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED AUGUST 25, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-2172

ANN L. GILL,

Plaintiff-Appellee,

v.

SYSTEM PLANNING CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-95-1683-A)

Argued: July 9, 1997

Decided: August 25, 1997

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

Reversed by unpublished per curiam opinion.

Appendix A

COUNSEL

ARGUED: Peter Stephen Saucier, KOLLMAN & SHEEHAN, P.A., Baltimore, Maryland, for Appellant. Linda Marie Jackson, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellee. **ON BRIEF:** Clifford B. Geiger, KOLLMAN & SHEEHAN, P.A., Baltimore, Maryland, for Appellant. Elaine C. Bredehoft, John M. Bredehoft, CHARLSON & BREDEHOFT, P.C., Reston, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

System Planning Corporation (SPC) appeals an order of the district court denying its motion for judgment as a matter of law after a jury awarded compensatory damages to Ann L. Gill on her claims of retaliation in violation of Title VII, *see* 42 U.S.C.A. § 2000e-3(a) (West 1994). Because we conclude that the jury verdict is not supported by substantial evidence, we reverse.

I.

SPC conducts research and development for the federal government, primarily as a defense contractor. During the spring and summer of 1994, when the events relevant to this litigation transpired, Gill was employed in SPC's Security and Information Systems Department (SISD), where her duties consisted of obtaining security clearances for SPC personnel and processing

visitor requests. Additionally, Gill had been trained as a "LAN mentor," a person who could assist others with the operation of a computer network important to SPC's business. Although Gill regularly supervised other employees, her duties were primarily clerical.

Beginning in 1990, SPC found it necessary to reduce its work force significantly in response to decreases in federal defense spending. As part of this process, in early 1994 SPC employed a consultant, Dorsey Clement, to review the structure and operation of SISD. At that time, the department consisted of six people, including Gill; all were aware that the size of the department would be reduced in an effort to promote efficiency and cost-effectiveness. After conducting her review, Clement recommended that SISD be reorganized to consist of three new positions: A facilities security officer (FSO), an information systems security officer, and a document control specialist. All other positions in SISD would be eliminated.

Linda Easley, who was responsible for oversight of SISD, announced the availability of the FSO position in early May. Several individuals, including Gill and her immediate supervisor, Phyllis Moon, expressed an interest in the position. Easley interviewed Gill, Moon, and one other person before awarding the post to Moon in mid-June. Gill protested Moon's promotion, insisting that Moon was not qualified to be FSO and that she had been selected only because of her race. Gill expressed these concerns to personnel in SPC's human resources department, to Easley, to Easley's supervisor, and to Moon herself and informed them of her intent to file a charge of racial discrimination. Thereafter, Easley — who had previously been friendly to Gill — began to treat her in a "cold" and "businesslike" manner. J.A. 202.

Appendix A

After Easley transferred SISD employees to the remaining new positions recommended by Clement and two other SISD employees voluntarily resigned, Gill was left as the only member of the department without a position. When Easley met with Gill to inform her of this situation, she offered Gill a security-related position in another department. Gill declined the offer, stating that she did not wish to work there. Gill also refused a secretarial position before reluctantly agreeing to serve as a facilities assistant. Easley offered Gill that post because it entailed implementing plans to relocate a large number of SPC employees, a task with which Gill had previously demonstrated some skill. Her pay, benefits, and grade remained the same.

After the meeting, Gill went home and remained on sick leave for two weeks, so traumatized by the employment change that she became physically ill. Gill's condition worsened when she was informed that security files had been removed from her office in her absence.[1] Gill's physician prescribed medication to alleviate her symptoms.

During the ensuing weeks, several incidents convinced Gill that she was no longer wanted at SPC. For example, upon reporting to her new position, Gill found herself in an office next to Easley and discovered that her duties consisted primarily of maintaining conference room supplies, packing boxes, and answering the telephone. And, although Gill had hoped to continue her activities as a LAN mentor, the computer in her new office was not powerful enough to support the LAN network. Shortly thereafter, Moon asked Gill to review some visitor requests while Gill was answering telephone calls at the front desk. Upon learning what Gill was doing, Easley instructed

1. Gill claims that her office was "cleaned out," but the record indicates that only the security files were removed.

Moon to take the visitor requests away, stating that Gill no longer possessed the requisite security clearance. Moon did so, causing Gill to burst into tears. Gill also was not informed of a staff meeting that was announced while she was away on sick leave.

Almost immediately after her transfer, Gill began to seek employment elsewhere. Because SPC could not charge the expenses of her new position to any defense contract, Gill was concerned that SPC might lay her off in order to reduce its overhead expenses, a fear heightened by the fact that her responsibilities had been significantly reduced. Within a few days, Gill received an offer of employment from another company as an assistant FSO. Although she initially declined the offer because the salary was $4,000 less than her salary with SPC, Gill changed her mind after she observed a draft of a memorandum listing SPC employees that did not include her name — an incident Gill describes in her brief as "a final cumulative blow." Brief for Appellee at 16.

After pursuing her administrative remedies, Gill filed this action in the district court alleging federal causes of action for discriminatory failure to promote and retaliation against SPC, *see* 42 U.S.C.A. §§ 2000e-2(a), 2000e-3(a) (West 1994), and several state-law claims against SPC and Easley. The district court granted judgment to the defendants on Gill's state-law claims at various stages in the litigation, leaving only the federal issues for the consideration of the jury. The jury concluded that SPC had not discriminated against Gill, but returned a verdict in Gill's favor on her retaliation claims and awarded $80,000 in compensatory damages. After denying SPC's motion for judgment as a matter of law or for a new trial, the district court awarded attorneys' fees of $61,459.14. SPC now appeals.

Appendix A

II.

SPC primarily contends that the district court erred in denying its motion for judgment as a matter of law. We review de novo the denial of a motion for judgment as a matter of law to "determine whether substantial evidence exists upon which the jury could find for the appellee." *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995). Thus, "[t]he question is whether a jury, viewing the evidence in the light most favorable to [Gill], could have properly reached the conclusion reached by this jury." *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*, 52 F.3d 499, 502 (4th Cir. 1995).

Gill's claims that SPC retaliated against her in violation of Title VII for pursuing a charge of racial discrimination rest on two distinct but factually related theories. First, Gill maintains that SPC retaliated against her by eliminating her position in SISD and transferring her to another position. Second, she argues that SPC constructively discharged her in retaliation for her threats to pursue charges of racial discrimination; the constructive discharge allegedly was accomplished through the elimination of her original position, the transfer, and the poor treatment she received after the transfer. We conclude, however, that the evidence in the record is insufficient to allow a rational jury to find in favor of Gill on either of her retaliation claims.

In order to establish a prima facie case of retaliation, a plaintiff "must show that (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and (3) a sufficient causal connection existed between his protected activity and his employer's adverse employment action." *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996). The burden of

production then shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *See Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 479 (7th Cir. 1995). Finally, the plaintiff must persuade the fact-finder that the asserted reason for the adverse employment action is a mere pretext and that the true reason for the action was retaliation. *See id.*

Gill's first claim of retaliation — based on the elimination of her position in SISD and her subsequent transfer — must fail because, even assuming that she can establish a prima facie case of retaliation,[2] SPC articulated a legitimate, nonretaliatory reason for its actions which Gill has failed to rebut. As Easley explained during her testimony, Gill's services were no longer necessary in SISD because her responsibilities, which had been primarily clerical and administrative, could be performed by computer. Our review of the record reveals no evidence to refute this explanation for the decision to transfer Gill to another department. Accordingly, substantial evidence does not exist to support a determination that SPC's asserted reason for Gill's transfer was mere pretext for retaliation, and the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this claim.

Gill's constructive discharge claim is similarly unsupported by the evidence in the record. In order to prove that she was

---

2. The validity of this assumption is by no means clear. For example, it is questionable whether Gill — who was transferred to a different position carrying the same grade, pay, and benefits — suffered an "adverse employment action." *See Hopkins*, 77 F.3d at 755 (suggesting that an employee whose position was eliminated during a reduction in force but who could have continued his employment in a different position did not suffer an adverse employment action).

constructively discharged, Gill must show that SPC made her working conditions objectively intolerable in a deliberate attempt to force her to resign:

> The doctrine of constructive discharge protects an employee from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his coworkers. The employee is not, however, guaranteed a working environment free of stress. Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.

Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994) (citations & internal quotation marks omitted).

The record clearly establishes that Gill was unhappy with her working conditions to the point that she suffered physical symptoms requiring medical treatment. However, Gill's reaction to her working conditions is immaterial. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (explaining that an employee's "unreasonably sensitive" reaction to the work environment does not provide proof of constructive discharge (internal quotation marks omitted)). Rather, the pertinent question is whether there is substantial evidence to support a finding that Gill's working conditions were objectively unreasonable. Gill has not satisfied this standard. First, as discussed above, Gill's transfer — which she characterizes as a demotion — does not alone prove that her working conditions were unreasonable. Gill experienced no loss of pay, grade, or benefits. And, the other incidents of which she complains, while

perhaps annoying or unpleasant, are not so intolerable that a reasonable person would feel compelled to quit. Moreover, Easley's efforts to find another position for Gill after her security position was eliminated belie the notion that SPC intended to force Gill to resign. We therefore conclude that substantial evidence does not support the jury verdict for Gill on her claim that SPC retaliated against her by means of a constructive discharge. Thus, the district court erred in refusing to grant SPC's motion for judgment as a matter of law on this count.

III.

Because the evidence produced in support of Gill's claims of retaliation is not sufficient to support the verdict, we determine that the district court erred in denying SPC's motion for judgment as a matter of law. Accordingly, we reverse. Our conclusion on this point renders consideration of SPC's other arguments on appeal unnecessary, but the award of attorneys' fees must also be vacated in light of our holding.

REVERSED

APPENDIX B — ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED SEPTEMBER 10, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 95-1683-A

ANN L. GILL,

Plaintiff,

v.

SYSTEM PLANNING CORP., et al.,

Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby

ORDERED that there is added to and made a part of the judgment entered on the jury verdict of July 24, 1996, attorney's fees in the amount of $53,058.75 and costs in the amount of $8,400.39.

s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 10th, 1995

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 95-1683-A

ANN L. GILL,

Plaintiff,

v.

SYSTEM PLANNING CORP., et al.,

Defendants.

MEMORANDUM OPINION

The First Amended Complaint in this action alleged claims for wrongful termination of employment (Count One), intentional infliction of emotional distress (Count Two), intentional interference with contractual relations (Count Three), failure to promote on the basis of race in violation of Title VII (Count Four), retaliation in violation of Title VII (Count Five), and discrimination in termination of employment in violation of Title VII (Count Six). Counts One, Four, Five and Six were asserted against the defendant, System Planning Corp. (SPC) only. Count Two was asserted against both SPC and defendant Linda Y. Easley. Count Three was asserted against Easley only.

By the time the case was submitted to the jury, the claims had been reduced to three — discrimination in employment, retaliation and constructive discharge. These claims were against SPC only.

Appendix B

Following a trial that lasted, including argument of counsel and the charge to the jury, two days, the jury after another day in deliberation found in favor of the defendant on the discrimination in promotion claim and in favor of the plaintiff on the retaliation and constructive discharge claims. Damages were awarded in the amount of $80,000 on the successful claims.

The matter is now before the court on the plaintiff's application for fees and costs. The defendant has filed its opposition.

The amount of fees claimed is broken down as follows:

Elaine C. Bredehoft	13.50 hours at $200	$ 2,700.00
Linda M. Jackson	416.70 hours at $125	52,087.50
John M. Bredehoft	20.60 hours at $250	5,150.00
Linda G. Hill	4.40 hours at $125	550.00
Carl F. Lettow, II	17.00 hours at $100	1,700.00
Blake M. Guy	4.20 hours at $100	420.00
Paralegals	108.50 hours at $75	8,137.50
		$ 70,745.00

In addition, costs totaling $11,345.90 consisting of $7,327.69 in taxable and $4,018.21 in non-taxable items, are requested.

Attorney's Fees

The hourly rates charged, if reasonable, multiplied by the reasonably expended hours, result in a presumptively reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). The hourly rates submitted are reasonable for this area, and thus the only issue is the time reasonably expended. Factors such as novelty or

complexity of the case, and the experience and skill of counsel, are normally fully reflected in the number of hours expended and the hourly rates. *Id.* at 898. The other factors identified in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978), warrant no adjustment.

The court cannot find, however, that the expenditure of hours claimed is reasonable in light of the partial success achieved. The successful and unsuccessful claims are sufficiently related so that it would be unfair to require an itemized allocation of effort between the two, and such commingling of effort does not warrant a denial of all fees, although some diminution of the requested fees is warranted under the "results obtained" factor as set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 431-37 (1983).

The court recognizes that in civil rights cases such as this a strict proportionality limitation is not always appropriate because there are often non-pecuniary objectives to be served by a successful plaintiff's claim, *City of Riverside v. Rivera*, 477 U.S. 561, 574-80 (1986), and the court does not impose a proportionality limitation in the award it here makes. Nevertheless, where as here the plaintiff has received only partial success, even though the claims are interrelated, the number of hours expended on the litigation as a whole times the hourly rate may result in an excessive award. *Hensley v. Eckerhart*, *supra* at 436. Focusing on the significance of the overall relief obtained, the award requested must be reduced. Although the court is not persuaded that comparing the verdict with the *ad damnum* in the complaint is a proper measure of the degree of success obtained — this ignores the reality of how *ad damnum* amounts are arrived at by the lawyers drafting the complaint — the plaintiff did fail in her underlying claim of discrimination

in promotion. Nor are there any policy objectives particularly served by the success on the other claims. This was basically a single issue, single plaintiff routine retaliation case[1]. There is no evidence that such behavior was widespread within the defendant company, and indeed the plaintiff has not sought, post trial, any injunctive relief. The plaintiff is the prevailing party, however, and obtained significant, although not overwhelming relief. The court cannot, despite defendant's suggestions of minor over-billing, find any obvious excessive charges, wasted effort, duplication of effort or use of more attorneys on a task than necessary. To the extent that there is effort expended on obviously unsuccessful claims, it is easily reflected in the reduction the court now makes.

In light of the foregoing, and admittedly based on no more than the court's best estimate of the extent to which the number of hours expended exceeds the number of hours fairly allocable to the successful claims, the court will reduce the amount claimed by 25%, to a figure of $53,058.75. The successful and unsuccessful claims are interrelated, and it would be manifestly unfair to further reduce the award by the deductions and percentage reduction suggested by the defendant.

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1. Retaliation was the basis of the constructive discharge claim.

Appendix B

Costs

The request for costs is broken down as follows:

I. Taxable costs

Deposition costs	$	5,406.05
Copying of trial exhibits		1,305.36
Filing fee		181.00
Witness fees		360.00
Exemplification of documents		75.28
Total taxable costs	$	7,327.69

II. Non-Taxable costs

LEXIS charges	$	690.45
Local messenger and Federal Express		482.75
Copying costs		1,415.45
Miscellaneous		1,429.56
Total non-taxable costs	$	4,018.12

The principal item of the taxable costs is the depositions charge. Some of the deposed witnesses were not called as witnesses at trial. This is not dispositive of whether their deposition costs are recoverable. *LaVay Cord. v. Dominion Federal Savings & Loan Assn.*, 830 F.2d 522, 528 (4th Cir.), *cert. denied*, 484 U.S. 1065 (1988). Some of the depositions addressed claims that were unsuccessful at trial. The court cannot say, however, that they were not reasonably necessary for trial preparation at the time they were taken. They are all thus

recoverable, including the charges for the Min-U-Script and disks. Unfortunately, such additions to transcripts are now normal for attorneys to require in trial preparation.

The other claimed taxable costs will also be allowed in full.

The following non-taxable cost items will be disallowed:

LEXIS	$ 690.45
In house photocopying ($468.25 + 357.25)	825.50
Miscellaneous charges	1,429.56

In sum, the following will be awarded:

Attorney's fees		53,058.75
Costs		
Taxable costs	$7,327.69	
Non-taxable costs	1,072.70	
		8,400.39

s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 10th, 1996

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED SEPTEMBER 6, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 95-1683-A

ANN L. GILL,

Plaintiff,

v.

SYSTEM PLANNING CORPORATION,

Defendant.

ORDER

This matter is before the court on the motion of defendant System Planning Corporation for judgment as a matter of law or, in the alternative, a new trial. Upon consideration of the parties' submissions, it is hereby

ORDERED that defendant's motion is denied. The court recognizes the different standards applicable in motions for judgment as a matter of law and a new trial, but the issues raised in the present motion are for the most part the same as those raised at trial and immediately following the verdict. The court concludes now, as then, that there was ample evidence to support the jury's award, that the arguments of plaintiff's counsel and

her questions to witnesses at trial were not improper, and that the instructions to the jury accurately stated the law applicable to the case. The court likewise concludes that the $80,000 award in this case clearly distinguishes it from *Hetzel v. County of Prince William*, __ F.3d __, 1996 WL 386464 (4th Cir. July 11, 1996).

s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 6, 1996

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2172
CA-95-1683-A

ANN L. GILL

Plaintiff - Appellee

v.

SYSTEM PLANNING CORPORATION

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — STATUTORY PROVISIONS INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

§ 704 [§ 2000e-3]. Other unlawful employment practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Appendix E

Section 1981a of the Civil Rights Act

42 U.S.C. § 1981a

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 2000e-5 or 2000e-16 of this title against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 2000e-2, 2000e-3, or 2000e-16 of this title, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 2000e-5 or 2000e-16 of this title (as provided in section 12117(a) of this title, and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations

implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 12112 of this title, or committed a violation of section 12112(b)(5) of this title, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 2000e-5(g) of this title, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 12112(b)(5) of this title or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Appendix E

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 2000e-5(g) of this title.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section —

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means —

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under subchapter VI of this chapter; or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or

proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Supreme Court, U.S.
FILED
JAN 30 1998
CLERK

No. 97-949

In The

Supreme Court of the United States

October Term, 1997

ANN L. GILL,

Petitioner,

vs.

SYSTEM PLANNING CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Ann L. Gill claims that she was retaliated against and constructively discharged in violation of Title VII of the Civil Rights Act. 42 U.S.C. § 2000e, *et seq.* These claims allegedly arise out of Ms. Gill's August 1994 resignation of employment with System Planning Corporation[1] ("SPC") following a transfer to a new job with no loss of grade, pay or benefits. Although the facts of this case should not prove particularly important to the determination of whether to grant the Petition for Writ of Certiorari, the misleading and unsubstantiated version of events set forth in the Petition must be corrected.

SPC conducts research and development activities for the federal government, primarily as a defense contractor.[2] Ms. Gill was employed in SPC's Security and Information Systems Department (SISD) from 1984 until she was transferred in August 1994. As a Security Assistant, Ms. Gill performed mostly clerical and administrative functions that could be performed by computers by 1994. Because of intense competition and severe cutbacks in federal defense spending, SPC determined it was necessary to reduce costs and make more efficient use of technology. As one element of its effort to become more

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[1] System Planning Corporation does not have a parent company or any nonwholly owned subsidiaries. *See* Supreme Court Rule 29.6.

[2] The facts in the text of this Brief in Opposition are described by the Fourth Circuit in its opinion below, Appendix A to Petition for Writ of Certiorari ("Petition") at pp. 2a-5a.

competitive, SPC reduced its workforce by fifty percent (50%) between 1991 and 1994.

SPC reduced its workforce systematically, focusing its efforts on SISD beginning in January 1994. SPC wanted to reduce SISD by half and improve its efficiency and performance. As part of this process, SPC hired Dorsey Clement, an outside consultant and former SPC employee, to evaluate the structure and operation of SISD. After concluding her review, Ms. Clement determined that SISD should be reorganized to consist of three positions: a facilities security officer (FSO); an information systems security officer; and a document control specialist. This reorganization would reduce the number of positions in SISD from six to three. As early as April 1994, all SISD employees, including Ms. Gill, knew that three positions would be eliminated from SISD.

In May 1994, Ms. Gill applied for and did not get the FSO position, which would have been a promotion. The position went instead to Phyllis Moon, who was Ms. Gill's supervisor. Unlike Ms. Gill, Ms. Moon already held a management position with SPC and had significant experience with Automated Information Systems (AIS), an area in which SISD needed help. Ms. Gill, who is white, publicly protested the selection of Ms. Moon as FSO, insisting that she was not qualified and that she had been selected only because she is black. Ms. Gill shared her opinion with anyone who would listen, including Ms. Moon. Ms. Gill refused any attempt to use internal grievance procedures and immediately announced that she would file a charge of racial discrimination.

In July 1994, SPC was ready to implement the remainder of Ms. Clement's recommendations, which still required the elimination of three positions. Not surprisingly, two positions were vacated while the reorganization decision was pending. SPC decided that employees who vacated these positions would not be replaced. It was necessary, however, to displace Ms. Gill to eliminate a third position. The three employees who remained in SISD were significantly more qualified than Ms. Gill. SPC still had three employees in SISD when this case went to trial.

At the same time other employees were being laid off, SPC decided to find Ms. Gill another job within its organization rather than terminate her employment. Linda Easley, SPC's Director of Administration, met with Ms. Gill to discuss this possibility. Ms. Easley offered Ms. Gill several alternatives, including jobs as: (1) a Personal Assistant; (2) a Security Assistant; and (3) a Facilities Assistant. Ms. Gill was not interested in being a Personal Assistant unless absolutely necessary. She also rejected the security position, which was the only available job that would have allowed her to remain in the security field, because of "continual catfighting" among the employees with whom she would have to work.

The only job in which Ms. Gill indicated a willingness to work was Facilities Assistant. This job included supervisory responsibility, which Ms. Gill did not have in the SISD. Ms. Easley made it clear that Ms. Gill would not lose any grade, pay, or benefits by virtue of the transfer to the new full-time position. In addition to overall responsibility for the telephone system and dealing with outside vendors, Ms. Gill was to be responsible for managing the

plan to relocate a large number of SPC employees. Ms. Easley had previously assured Ms. Gill that SPC would support any additional training or education she was willing to assume.

Ms. Gill returned from two weeks of sick leave and never gave the facilities job a chance. The same day she reported to her new position, Ms. Gill started circulating her resumé looking for other employment. On August 2, 1994, her fifth day as a Facilities Assistant, Ms. Gill received a job offer to be an Assistant FSO from Areté Engineering Technology Corporation ("AETC"). The job paid $4,000 less than Ms. Gill was making at SPC, but it was consistent with her aspirations in the security field. Ms. Gill asked AETC to put the job offer in writing.

Ms. Gill did not tell anyone at SPC that she was unhappy as a Facilities Assistant, nor did she tell anyone that she was looking for another job. During Ms. Gill's short stay in facilities, Ms. Easley continued to ask Ms. Gill if she was interested in returning to a security-related position. Ms. Easley also asked Ms. Gill whether she was still interested in being involved with the Local Area Network (LAN) Mentoring Program. Ms. Gill, who by this time had another job offer in hand, responded that she did not know what she wanted.

On August 3, 1994, Ms. Gill's sixth day as a Facilities Assistant, she noticed that her name had been omitted from a draft memo detailing organizational changes. Notwithstanding the fact that Ms. Easley was still making changes and trying to determine whether Ms. Gill wanted to return to a security position, Ms. Gill considered this omission the "final cumulative blow." The other "blows"

presumably were that she did not like her new job duties, and she had not been informed of a department meeting that was announced while she was out on sick leave. When Ms. Gill returned home from work that day, she accepted AETC's written job offer.

Ms. Gill filed a lawsuit alleging causes of action including discriminatory failure to promote and retaliation against SPC. A trial was held and the jury returned a mixed verdict. The jury found for SPC on the promotion claim and for Ms. Gill on her claims of retaliation and constructive discharge. The jury awarded $80,000 in compensatory damages. SPC moved for judgment as a matter of law or, in the alternative, for a new trial. The trial court summarily denied SPC's motion and entered judgment on the jury verdict. The trial court later awarded costs and attorneys' fees totaling $61,459.14.

The Court of Appeals for the Fourth Circuit reversed the trial court, holding that the trial court should have granted SPC's motion for judgment as a matter of law on Ms. Gill's claims of retaliation and constructive discharge. In both cases, the Fourth Circuit held that Ms. Gill had failed to present sufficient evidence to support the jury's verdict.

REASONS FOR DENYING THE WRIT

The Petition misrepresents the legal standards applied by the Court of Appeals in a desperate attempt to manufacture a question that merits this Court's attention. The Court of Appeals did not require Ms. Gill to prove

"pretext plus," and it did not apply a "no choice" standard for constructive discharge. The Fourth Circuit's decision on each claim resulted from the proper application of a well-settled legal standard. Ms. Gill is asking this Court to reexamine the factual record in this case, something which is not important to anyone other than SPC and Ms. Gill.

Although the Petition exclaims that the right to a jury trial in civil rights cases is in serious jeopardy in the Fourth Circuit, one need look no further than that court's most recent decisions to dispel such an alarmist claim. For example, in *Harris v. L&L Wings, Inc.*, ___ F.3d ___, 1997 WL 786926 (4th Cir. (S.C.)), decided December 24, 1997, the Fourth Circuit affirmed a jury verdict awarding compensatory and $150,000 punitive damages to each of two sexual harassment plaintiffs. Clearly, the Fourth Circuit does not hesitate to uphold jury verdicts properly supported by the evidence.[3]

A. The Petition Misrepresents The Standard For Intentional Retaliation Applied By The Court of Appeals.

The Court of Appeals did not require Gill to show "pretext plus" to support her retaliation claim. The

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[3] The petitioner also finds fault with the fact that the Court of Appeals disturbed a verdict that "had been reviewed and confirmed by on the most experienced federal trial judges in the country." (Petition at p. 5). Ironically, Petitioner then refers this Court to the Petition for Writ of Certiorari filed in *Grier v. Titan Corp.* filed concurrently with the Petition, which in part attacks a decision by the same federal trial judge.

decision was a straightforward application of the shifting burden of proof scheme developed starting with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and most recently explained by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The Court of Appeals did not have to address any of the finer points raised in *Hicks*, because Ms. Gill failed to create a genuine dispute of material fact concerning the reason she was transferred to facilities. This cannot be a "pretext plus" case, because there was not even any evidence of pretext.

The analysis is not difficult. Ms. Gill was required to establish a *prima facie* case of retaliation, which shifted the burden to SPC to articulate a legitimate nondiscriminatory reason for its actions. The final part of the test, according to the Court of Appeals, was that "[t]he plaintiff must persuade the factfinder that the asserted reason for the adverse employment action is a mere pretext and that the true reason for the action was retaliation." (Appendix A to Petition at p. 7a). This is not inconsistent with *Hicks* or with any decision of another Federal Appellate Court interpreting or applying *Hicks*.

A plaintiff always bears the ultimate burden of persuading the factfinder that the reason for an adverse employment action is a mere pretext and that the real reason was retaliation. This, however, does not create a "pretext plus" standard. It is the articulation of this Court's decision in *Hicks* that proof of the elements of a *prima facie* case, along with disbelief of the employer's reasons, does not entitle the plaintiff to judgment as a matter of law. The phrase "and that the real reason was retaliation," recognizes the possibility that a jury will

disbelieve an employer's reasons but find that the real reason was not discrimination.

The authority cited in the Petition relies upon proof of a *prima facie* case *and* disbelief of the defendant's reasons. Accordingly, there must be evidence from which a jury could disbelieve the defendant. Otherwise, every plaintiff who could establish a *prima facie* case would be entitled to a jury trial. Nothing in *Hicks* or any of the cases cited in the Petition creates such a right.

The Court of Appeals assumed, without deciding, that Ms. Gill had established a *prima facie* case of retaliation.[4] Ms. Gill's case then fell apart. The Court of Appeals reviewed the record to determine whether there was substantial evidence to support a disbelief of SPC's reasons for transferring Ms. Gill. The Court of Appeals concluded that Ms. Gill had failed to present evidence from which a reasonable jury could disbelieve SPC's reason for transferring her to the facilities job.

SPC explained that Gill was transferred to facilities because her duties, which were primarily clerical and administrative, could be performed by a computer. The Court of Appeals wrote:

> Our review of the record reveals no evidence to refute this explanation for the decision to transfer Gill to another department. Accordingly, substantial evidence does not exist to support a

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[4] The Court of Appeals noted that "the validity of this assumption is by no means clear." (Appendix A to Petition at p. 7a).

> determination that SPC's asserted reason for Gill's transfer was mere pretext for retaliation.

(Appendix A to Petition at p. 7a).

The Court of Appeals did not apply a "pretext plus" standard because Ms. Gill's case failed much earlier in the process, when she failed to create a genuine dispute of material fact concerning the reason she was transferred to facilities.

B. The Petition Misrepresents The Standard For Constructive Discharge Applied By The Court of Appeals.

The Court of Appeals did not require Ms. Gill to show that she had literally "no choice" but to resign. The petitioner states that the appellate and trial courts in this case relied upon *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996). This is also false. Neither court relied on *Blistein*. It is clear that the phrase "no choice," which the petitioner has incorrectly seized upon, was not meant to establish a literal standard. It is a vernacular iteration of the proper legal standard.[5]

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[5] See *Blistein*, 74 F.3d at 1468 (where the court writes, "intolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign – that is whether he would have no choice but to resign.") (citation omitted).

The Court of Appeals required Ms. Gill to prove that her working conditions were so intolerable that a reasonable person would have felt compelled to resign.[6] (Appendix A to Petition at p. 8a). This is the same standard applied by every other Federal Appellate Court. *See Aviles-Martinez v. Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (whether " 'working conditions would have been so difficult or unpleasant that a reasonable person in employee's shoes would have felt compelled to resign' ") (citation omitted); *Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 361 (2d Cir. 1993) (whether employer deliberately created working conditions " 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' ") (citation omitted); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (whether the "conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign"); *McCann v. Litton Sys., Inc.*, 986 F.2d 946, 951 (5th Cir. 1993) (whether working conditions become so difficult or unpleasant that a reasonable person in employee's shoes would be compelled to resign); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991) (whether " 'employment options would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' ") (citation omitted); *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993) (whether employer made working conditions so intolerable that

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[6] The Petition does not address the part of the constructive discharge standard dealing with an employer's intent.

employee was forced to resign); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1217 (8th Cir. 1986) (employee required to show "working conditions that a reasonable person would find intolerable"); *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990) (whether a reasonable person in plaintiff's position would have felt forced to quit); *Acrey v. American Sheep Indus. Ass'n*, 981 F.2d 1569, 1573-74 (10th Cir. 1992) (whether employer's actions "would compel a reasonable person to resign"); *Wilson v. S&L Acquisition Co.*, 940 F.2d 1429, 1436 (11th Cir. 1991) (did plaintiff show that her "working conditions were so unpleasant that a reasonable person would have felt compelled to resign?"); *Katradis v. Dav-El*, 846 F.2d 1482, 1485 (D.C. Cir. 1988) (whether working conditions "would drive a reasonable person to resign") (citation omitted).

The Court of Appeals applied the well-settled legal standard for constructive discharge and concluded that substantial evidence did not exist to support the jury verdict. The petitioner's representation that the Fourth Circuit applied some aberrant standard is simply not true. Ms. Gill is merely asking this Court to review the record and make factual determinations. This is a garden variety constructive discharge claim, the standard for which is not in dispute among the Circuits. This case does not warrant the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, System Planning Corporation urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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